

SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM - 1971

No. 71-5445

GERALD SHADWICK, *Appellant*,

v.

CITY OF TAMPA, *Appellee*.

APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE APPELLEE

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OPINION BELOW

The opinion of the Supreme Court of Florida (A. 41) is reported at 250 So. 2d 4 (1971).

JURISDICTION

Jurisdiction of this Court rests on 28 U.S.C. 1257 (2).

CONSTITUTIONAL PROVISIONS AND FLORIDA
STATUTES INVOLVED

The constitutional provisions involved are the Fourth and Fourteenth Amendments, United States Constitution (App. 1). The statutes involved are Florida Statute (1967), Section 168.04, F.S.A.; Section 17, Chapter 5363, Laws of Florida, 1903 and Section 1, Chapter 61-2915, Laws of Florida, 1961 (Special Laws of Florida incorporated in Sections 495 and 160.1, respectively, Charter of the City of Tampa). These statutes are printed in the appendix attached to this brief (App. 1, 2).

QUESTIONS PRESENTED

- I. WHETHER SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS, AND IMPLIEDLY THEREWITH, THE POWER TO DETERMINE PROBABLE CAUSE, ARE CONSTITUTIONAL EXERCISE OR DELEGATION OF A QUASI-JUDICIAL POWER AND CONFORM TO THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.
- II. WHETHER THE CLERK AND DEPUTY CLERKS OF THE MUNICIPAL COURT OF THE CITY OF TAMPA ARE NEUTRAL AND DETACHED "MAGISTRATES", UNCONNECTED WITH LAW ENFORCEMENT, FOR THE PURPOSE OF ISSUING ARREST WARRANTS WITHIN THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BY VIRTUE OF THE FLORIDA STATUTES FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS.

STATEMENT OF THE CASE

This is an appeal from a final judgment rendered by the Supreme Court of Florida, reported as *Shadwick v. City of Tampa*, 250 So. 2d 4 (1971) (A. 41-43) where the question of the validity of state statutes (App. 1, 2) as being repugnant to the Fourth and Fourteenth Amendments, United States Constitution, were drawn into question, and the decision was in favor of their validity. The statutes involved vest in the city clerks the power to issue arrest warrants, and impliedly therewith, the power to determine the question of probable cause for the arrest.

In this brief the parties will be referred to as they stand in this Court, Appellant and Appellee, respectively.

The following symbols will be used:

"A." for Single Appendix.

"R." for original Record-on-Appeal to Supreme Court of Florida.

"App." for Appendix to this Brief for Appellee.

"A.B." for Appellant's Brief.

For the purpose of correcting inaccuracies or omissions in the Statement of the Case (A.B. - 4, 5) in Appellant's Brief, the following statements are deemed necessary.

Contrary to Appellant's statement that the District Court of Appeal, Second District, held that neither the State nor Federal Constitution require that the determination of probable cause necessary for the issuance of arrest warrants be made by a judicial officer (A.B. - 5), the Court stated,

"We . . . held that the decision whether to issue a warrant is, at most, quasi-judicial and not within the 'judicial power' reserved by the constitution to the judicial branch." (A. - 33).

* * *

". . . that the person who issues the warrant be neutral and disinterested, and that such person make a finding of probable cause before issuing a warrant. We see no evidence that the city clerk is unalterably aligned with the forces of law enforce-

ment and therefore he may fulfill the role of the neutral person which the constitution requires to be placed between the police and the public." (A. - 35).

The Appellant omitted the holdings of the Supreme Court of Florida directed to the issue raised and expressly passed upon, as follows:

"... the determination of probable cause for an arrest need not be confined to strictly judicial officers, as such a function is only quasi-judicial. *Ocampo v. U.S.*, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914)." (A. - 42).

* * *

"... the statutes authorizing a clerk or deputy clerk of a municipal court to issue arrest warrants are not an unconstitutional exercise or delegation of 'judicial power' and conform to the requirement of the Fourth and Fourteenth Amendments to the Constitution of the United States." (A. - 42).

SUMMARY OF ARGUMENT I.

Appellant did not raise, brief or argue the conclusory terms of the affidavit (A. - 4) for issuing the arrest warrant, (A. - 5), which is the reason why there is no complaint, evidence or record in support of that affidavit (A. - 4) on this issue.

It would be highly unjust to the labors of the Florida courts under these circumstances for this Court to reverse the lower court's judgment (A. - 41), under the authority of 28 U.S.C. 2106, especially since Appellant has not been tried nor lost his right to raise these issues prior thereto."

Justice under the circumstances is not served, but subverted, if good law and sound reasoning (A. - 41) falls to the snare of unraised issues and unmade record.

The Constitution of the State of Florida provides that special laws or general laws of local application, such as are here involved (App. 1, 2), may be passed by the Legislature pertaining to the duties of municipal officers. The Legislature by these laws has provided that the clerk or deputy clerks of the municipal court shall issue arrest warrants in the City of Tampa.

This Court has held that the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer. *Ocampo v. United States*, 234 U.S. 91, 100 (1914).

A quasi-judicial power to issue warrants of arrest implies the power to determine probable cause. The legislature in giving this power to clerks could not have intended to withhold the functions necessary to exercise that power (determine probable cause).

Neither the Fourth or Fourteenth Amendments, United States Constitution, nor any case law by this Court forbids states to legislate quasi-judicial powers or duties to clerks.

ARGUMENT I.

WHETHER SPECIAL AND GENERAL LAWS PERTAINING TO DUTIES OF CLERKS OF THE MUNICIPAL COURT TO ISSUE ARREST WARRANTS, AND IMPLIEDLY THEREWITH, THE POWER TO DETERMINE PROBABLE CAUSE, ARE CONSTITUTIONAL EXERCISE OR DELEGATION OF A QUASI-JUDICIAL POWER AND CONFORM TO THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Appellant cites in his brief (A.B. - 6, 7) numerous decisions by this Court, that before an arrest warrant is issued by a magistrate, that the Fourth and Fourteenth Amendments require that he be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. See, *Whiteley v. Warden of Wyoming State Penitentiary*, 401 U.S. 560 (1971) and the cases cited therein.

It logically follows that an affidavit which is conclusory such as here involved (A. - 4) is not constitutionally sufficient. *Aguilar v. Texas*, 378 U.S. 108 (1964). This is to be distinguished from those cases where the search or arrest warrant itself is invalid when issued by a police officer, attorney general, prosecutor or government enforcement agent because they are not "neutral and detached magistrates." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In the case, sub judice, the deputy clerk of the municipal court of the City of Tampa issued the arrest warrant (A. - 5) and his neutrality and detachment is the subject of the second argument in this brief.

If this Court accepts the issue submitted by the Appellant upon the basis of the conclusory terms of the

affidavit (A. - 4) as being insufficient information to support an independent judgment by the clerk that probable cause existed, it should do so upon the basis of the record as in *Whiteley, supra*,

"Yet the state concedes, as on the record it must, that at *every* stage in the proceedings below petitioner argued the insufficiency of the warrant as well as the lack of probable cause at the time of the arrest." 401 U.S. at 569. (Emphasis supplied).

This Appellant has failed to do so at *every* essential stage in the proceedings below.

Appellant's issue regarding the conclusory affidavit (A. - 4) was not raised, briefed or argued in the trial court, the Municipal Court of the City of Tampa (A. - 8, 9); nor in the Circuit Court, Hillsborough County, Florida, on Petition for Writ of Certiorari (A. - 3, 4, 13, 14); nor on appeal to the intermediate state court, the District Court of Appeal, Second District, by assignments of error (A. - 12) or by argument (A. - 33); nor briefed or argued (A. - 42) in the Supreme Court of Florida (See Appellant's and Appellee's Brief to Supreme Court of Florida transmitted with the original record to the Clerk, Supreme Court of the United States).

The record is absolutely silent and left to speculation any factual information the clerk may have had for issuing the arrest warrant for the Appellant unlike the facts in *Whiteley, supra*, and for a very good reason, because whether the clerk in fact had sufficient information to determine probable cause was never an issue. The Order Denying Motion to Quash (A. - 10) and supporting motion (A. - 8) are clear that Appellant did not present to the municipal judge any sworn testi-

mony of Officer Larder, the clerk, the Appellant or any other witness for the purpose of questioning the existence of probable cause or the conclusory terms of the affidavit. As to the question of the printed-form affidavit (A. - 4) and Warrant (A. - 5), or the conclusory language therein, the only time the Appellant grasped at these lost issues was on Petition for Rehearing (A. - 36, 37) at the intermediate state court level and then completely abandoned them in the Supreme Court of Florida (A. - 41). This is further evidenced by the fact that Appellant did not file a Petition for Rehearing to that Court which certainly would have been done had these issues been briefed, argued and then ignored by the Supreme Court of Florida.

The argument made by Appellant in the circuit court shows that the issue was the constitutionality of the statutes (App. 1, 2) vesting the *power* in the clerks to issue arrest warrants and not the sufficiency of the affidavit (A. - 4), its form, or the sufficiency of factual information received by the clerk to determine probable cause. It was never a question of did the clerk determine probable cause. The question was, can he.

"Mr. Frier: . . . The position taken by the Petitioner in the original brief is that the City Charter did not authorize the Clerk to issue an arrest warrant (A. - 13, 14).

* * * *

"So we are here today solely on the question of the constitutionality of both statutes (A. - 14).

* * * *

"It is the contention of the Petitioner that a Clerk of the Court is an administrative officer and not *empowered* to exercise any discretion (A.-14). (Emphasis Supplied).

* * * *

"We are dealing here with whether or not a particular officer *can* exercise judicial functions; . . . (A. - 14). (Emphasis Supplied).

* * *

"Mr. Frier: The argument I have made doesn't say we have to have a Judge do it. The argument I have made contemplates a quasi-judicial officer initiating the charges or a judiciary determination of probable cause before the issuance of a warrant." (A. - 29, 30).

Again in the Supreme Court of Florida, the same argument appears as follows.

"Appellant says the clerk or deputy clerk of the municipal court is not a judicial officer such as could perform the *duties* of determining probable cause or *act* as a neutral or detached magistrate in the exercise of a judicial discretion to determine the existence of probable cause." (A. - 42). (Emphasis Supplied).

It is inconceivable and incongruous, had Appellant raised, briefed and argued the issues of the insufficiency of the affidavit being in conclusionary terms (A. - 4) and the insufficiency of probable cause required to issue the warrant (A. - 5), that one municipal judge, one circuit court judge, three district court judges and seven Justices of the Supreme Court of Florida missed the point.

If this Court is to speculate on these issues, then it should take a cold, hard look at the affidavit (A. - 4) where it states that Cpl. Larder "... has this day made *complaint* before me that on the 8th day of February, A. D. 1969, . . ." (Emphasis supplied) and ask itself where is that *complaint* in support of that affidavit. Why did Cpl. Larder wait one month from February 8,

1969, until March 6, 1969, (A. - 4) before he submitted a *complaint* in support of the affidavit? Could it be that there are facts in that *complaint* in support of the affidavit to establish probable cause? Could it be that Cpl. Larder arrested Appellant on the street on February 8, 1969, for "careless driving while drinking" and that the subsequent warrant (A. - 5) on March 6, 1969, was merely a rearrest?

All of this is pure speculation on the record before this Court, but no more speculative than these issues raised by the Appellant.

The point is that this Court should not condemn a warrant² procedure based upon speculation or inferences with no record to support issues which were never raised in the first place (A. - 8) or, for that matter, in the last place. (A. - 41). *Oxley Stave Co. v. Butler Co.*, 166 U.S. 648, 655 (1897).

The Supreme Court of Florida clearly set forth the issue that rests upon this Court's shoulders.

"The only question involved is whether Fla. Stat. (1967) Section 168.04, F.S.A., and Sections 495 and 160.1 of the Charter of the City of Tampa (the provisions of these statutes are included in the District Court of Appeal opinion, 237 So.2d 231, 232) are unconstitutional insofar as they purport to vest in the city clerk the *power* to issue arrest warrants, and impliedly therewith, the *power* to determine the question of probable cause for the arrest." (A. - 41) (Emphasis Supplied).

The Florida Constitution provides that special laws or general laws of local application which are here involved (App. 1, 2) may be enacted by the Legislature pertaining to the duties of municipal officers. Fla. Const. Art. III, Section 11 (a) (1) (1968).

Legislating quasi-judicial duties or powers are not an unconstitutional exercise or delegation of "judicial power." *Florida Motor Lines v. Railroad Commissioners*, 100 Fla. 538, 129 So. 876 (1930).

The general law on the subject is as follows:

"When so provided by *statute*, the authority to issue warrants may be vested in officers whose *other* duties are purely ministerial, such as clerks, . . ." 22 C. J. S., *Criminal Law*, Section 318, pp. 820, 821. (Emphasis Supplied).

"A clerk of court may not exercise judicial power except by constitutional or *legislative provision*, and then only in accordance with the strict language of the provision. . . .

* * * *

"Certain acts, although *partially judicial* in nature, may be performed by the clerk of the court. A familiar example is the *power* to issue *warrants of arrest*." 15 Am. Jr. 2d, *Clerks of Court*, Section 22, pp. 528, 529. (Emphasis Supplied).

In *Ocampo v. United States* 234 U.S. 91, 93-95 (1914) the appellant contended that his arrest was without a preliminary finding of probable cause in violation of his rights secured under the Philippine Bill of Rights, Section 5, which was enacted by the Congress of the United States on July 1, 1902. The act followed certain provisions of the Constitution of the United States, to wit, the Fourth and Fourteenth Amendments, which are the constitutional provisions here involved (App. 1).

"Sec. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein the equal protection of the law.

* * * *

"That no warrant shall issue but upon probable cause, supported by oath or affirmation..."
Ocampo, supra, 234 U.S. at 94, 95.

In *Ocampo* in considering the due process and equal protection clauses this Court held that constitutional guarantees do not require territorial uniformity among the several states, local governments or cities regarding the administration of justice such as the right to a preliminary examination (criminal procedure). *Ocampo, supra*, 234 U.S. at 98, 99. See also, *Salsburg v. State of Maryland*, 346 U.S. 545, 552-553 (1954). The requirement of state-wide uniformity in criminal procedures would inhibit progress in the administration of Justice. *United States v. Commissioners of Correction, City of New York*, 316 F. Supp. 556, 564-566 (D. C. S.D.N.Y. 1970).

More importantly, and in point to the issues before this Court as expressly passed upon by the Supreme Court of Florida (A. - 41), the Supreme Court of Florida followed the *Ocampo* decision (A.- 42) that,

"... the function of determining that probable cause exists for the arrest of a person accused is only *quasi-judicial*, and not such that, because of its nature, it must necessarily be confided to a *strictly judicial officer* or tribunal." (Emphasis Supplied). *Ocampo, supra*, 234 U.S. at 100.

The various legal concepts contained in *Ocampo* have been followed in fourteen states. *Burke v. Superior Court*, 3 Ariz. App. 576, 416 P. 2d 997, 1000 (Ct. App. Ariz. 1966); *Parks v. Superior Court*, 236 P.2d 874, 882 (1st D.C.A. Calif. 1951); *Kennedy v. Walker*, 135 Conn. 262, 63 A.2d 589, 594 (Sup. Ct. Conn. 1948); *Shadwick v. City of Tampa*, 250 So. 2d 4 (Sup. Ct. Fla. 1971); *State v. Swafford*, 250 Ind. 541, 237 N.E. 2d 580, 584 (Sup.

Ct. Ind. 1968); *Bailey v. Hudspeth*, 164 Kan. 600, 191 P. 2d 894, 898 (Sup. Ct. Kan. 1948); *State v. Guidry*, 247 La. 631, 173 So. 2d 192, 194 (Sup. Ct. La. 1965); *Wampler v. Warden of Maryland Penitentiary*, 231 Md. 639, 191 A.2d 594, 600 (Ct. App. Md. 1963); *Lockapelle v. United Shoe Machinery Corporation*, 318 Mass. 166, 61 N.E. 2d 8, 10 (Sup. Ct. Mass. 1945); *People v. Richter*, 206 Misc. 304, 133 N.Y.S.2d 685, 688 (1954); *State v. Furmage*, 250 N.C. 616, 109 S.E.2d 563, 570 (Sup. Ct. N.C. 1959); *Moseley v. Welch*, 218 So. C. 242, 62 S.E.2d 313, 317 (Sup. Ct. So. C. 1950); *State v. Jefferson*, 79 Wash. 2d 345, 485 P.2d 77, 79 (Sup. Ct. Wash. 1971); *State v. Thompson*, 151 W. Va. 336, 151 S.E.2d 870, 873 (Sup. Ct. App. W. Va. 1966).

The power to issue warrants of arrest necessarily implies the power to hear and determine the issue of probable cause. *State v. Furmage*, 250 N.C. 616, 109 S.E.2d 563, 566 (Sup. Ct. N.C. 1959); *Kreulhaus v. City of Birmingham*, 164 Ala. 623, 51 So. 297, 299 (Sup. Ct. Ala. 1909). It would be senseless for a legislature to confer a quasi-judicial power or duty and not intend that the official perform the functions necessary to exercise that power or duty (determine probable cause).

Appellant in his brief states that Delaware, Indiana, Wisconsin and Minnesota have held that a clerk is prohibited the power to determine probable cause under the Fourth and Fourteenth Amendments (A.B. - 12). This is just not correct.

Delaware has taken the position that other procedures in other states, different from the State of Delaware, are not unique and conform to constitutional standards. *Grano v. State*, 257 A.2d 768, 773-774 (Sup. Ct. Del. 1969).

Indiana has not taken a position contrary to Florida in the case, sub-judice,

"... it is a long standing rule in Indiana that the determination of probable cause is a judicial determination to be made by a judge or magistrate, and not a ministerial determination." *French v. Hendricks Superior Court*, 252 Ind. 213, 247 N.E.2d 519, 525 (Sup. Ct. Ind. 1969) (Emphasis Supplied).

Even more favorable to the Florida position, the Indiana Supreme Court was divided over the issues before it. See the strong dissent by Justice Arterburn in *French, supra*. 247 N.E.2d at 528. More recently in a decision written by now Chief Justice Arterburn, the Indiana Supreme Court has held that where an arrest has already been made by a police officer, then probable cause already exists and a subsequent affidavit in support of a rearrest warrant is not necessary. *Rector v. State*, 271 N.E.2d 452, 454-455 (Sup. Ct. Ind. 1971).

The one case in Wisconsin that Appellant cited in his brief (A.B. - 12) did not involve a clerk. That case held that a district attorney is not a magistrate such as can be neutral and detached as required by the Fourth and Fourteenth Amendments. *State v. Simpson*, 28 Wisc. 2d 590, 137 N.W.2d 391 (Sup. Ct. Wisc. 1965). In fact Wisconsin has specifically held that the legislature may confer upon clerks of courts the power to issue arrest warrants. *State v. Van Brocklin*, 194 Wisc. 441, 217 N.W. 277, 278 (Sup. Ct. Wisc. 1927); *Family Finance Corp. of Bay View v. Sniadach*, 37 Wisc. 2d 163, 154 N.W.2d 259, 266 (Sup. Ct. Wisc. 1967), reversed on other grounds, 395 U.S. 337.

The only state supporting Appellant's position on the constitutionality of a statute authorizing clerks to issue warrants is Minnesota. *State v. Paulick*, 277 Minn.

40, 151 N.W.2d 591 (Sup. Ct. Minn. 1967). The court in *Paulick* obviously struck down the statute authorizing municipal court clerks to issue warrants because that statute was *in conflict with* the general law of Minnesota which specifically provided that only magistrates may do so. Id., 151 N.W.2d at 593-594. Obviously, the municipal court clerks were not designated magistrates under Minnesota's general law.

In Florida, however, under the special and general laws (App. 1, 2) authorizing the clerk of the municipal court, or his deputies, to issue warrants for arrest are not incompatible or in conflict with each other (A. -42). *Headley v. State*, 166 So.2d 479 (3rd D.C.A. Fla. 1964); *Shadwick v. City of Tampa*, 250 So.2d 4 (Sup. Ct. Fla. 1971), which is the decision here on Appeal (A. -41). Unlike Minnesota, Florida general law provides that the clerk may issue arrest warrants (App. 1). Fla. Stat. Section 168.04 (1967).

Alabama and North Carolina have not changed their stand with Florida in regard to clerks as implied in Appellant's brief (A. -12). *Kruelhaus v. City of Birmingham*, 164 Ala. 623, 51 So. 297 (1909); *State v. Furmage*, 250 N.C. 616, 109 S.E.2d 563 (1959). Alabama and North Carolina have held, as Appellant failed to point out in his brief in the cases he cited for a changed position regarding clerks in these states (A.B. -12), that statutes allowing a police officer to be a magistrate in Alabama may be unconstitutional (dictum because the issue was not directly before the court) and that statutes allowing a "desk officer" appointed by the chief of police to issue warrants in North Carolina failed to meet the requirements of the Fourth and Fourteenth Amendments. *Miller v. City of Birmingham*, 44 Ala. App. 628, 218 So.2d 281 (Ct. App. Ala. 1969); *State v. Mat-*

thews, 270 N.C. 35, 153 S.E.2d 791 (1967). As previously well documented, police officers are not neutral and detached magistrates. The case, sub judice, does not involve a police officer issuing warrants. It involves a *clerk* (A. -5).

There is nothing in the Fourth and Fourteenth Amendments, United States Constitution (App. 1), or case law by this Court that forbids states to legislate quasi-judicial powers or duties to clerks of municipal courts establishing a procedure to issue arrest warrants, and impliedly therewith, the power to determine probable cause.

CONCLUSION I.

The judgment of the Supreme Court of Florida (A. - 41) should be affirmed.

SUMMARY OF ARGUMENT II.

The word "magistrate" as applied in the case law in the Federal and the Florida jurisprudence to determine the constitutionality of a warrant system is given a broad meaning.

The Supreme Court of the United States and the Supreme Court of Florida have both held that minor officials such as clerks are "magistrates" by virtue of the state laws fixing their powers.

The clerks of the municipal court of the City of Tampa are not sworn police officers and are not appointed by the chief of police. They are responsible to the judicial department of the City of Tampa as officers of the court and are neutral and detached "magistrates" required by the Fourth and Fourteenth Amendments, United States Constitution, to be placed between law enforcement and the public.

ARGUMENT II.

WHETHER THE CLERK AND DEPUTY CLERKS OF THE MUNICIPAL COURT OF THE CITY OF TAMPA ARE NEUTRAL AND DETACHED "MAGISTRATES", UNCONNECTED WITH LAW ENFORCEMENT, FOR THE PURPOSE OF ISSUING ARREST WARRANTS WITHIN THE REQUIREMENTS OF THE FOURTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, BY VIRTUE OF THE FLORIDA STATUTES FIXING THEIR POWERS AND DUTIES TO ISSUE ARREST WARRANTS.

In the realm of a constitutional warrant procedure, can a clerk or deputy clerk be a "magistrate."

This Court has given the word "magistrate" a broad meaning. In a general sense a magistrate is a public civil officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain; though in a narrow sense he is regarded as an inferior judicial officer. *J. D. Compton v. State of Alabama*, 214 U.S. 1, 7(1909). Mr. Justice Storey was quoted in *Compton, supra*,

"I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer." *Id.*, 214 U.S. at 7.

The Supreme Court of Florida following the Supreme Court of the United States in *Compton, supra*, has also given the word "magistrate" a broad meaning and has held a deputy clerk to be a magistrate within the meaning of a federal extradition act by virtue of the powers vested in said clerk under the laws of the State of New York. *State ex rel Miller v. McLeod*, 142 Fla. 254, 194 So. 628, 630 (Sup Ct. Fla. 1940).

In the federal system, clerks of municipal court clothed with authority under state statutes to issue arrest warrants are considered to be "magistrates." See generally, *State v. Ruotolo*, 52 N.J. 508, 247 A.2d 1, 5 (1968) footnote No. 4, citing *State ex rel Miller v. McLeod*, *supra*.

Other definitions of a "magistrate" are contained in the following:

"A person clothed with power as a public civil officer; a public civil officer invested with executive or judicial powers; . . ." *Webster's New International Dictionary, Second Edition*, unabridged, page 1479.

"Person clothed with power as a public civil officer. *State ex rel Miller v. McLeod*, 142 Fla. 254, 194 So. 628, 630." *Black's Law Dictionary, 4th Edition*, page 1103 (1957).

There is no question that a constitutional warrant procedure requires that inferences from facts which lead to the complaint "... be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Giordenello v. U.S.*, 357 U.S. 480, 486 (1958); *Johnson v. U.S.*, 333 U.S. 10, 14 (1948); *U.S. v. Lefkowitz*, 285 U.S. 452, 464 (1932); *U.S. v. Kirschenblatt*, 16 F.2d 202, 203 (2nd C.C.A. 1926).

In Florida, as in New Jersey, the clerk is completely independent of any agency charged with the apprehension and prosecution of offenders. *State v. Ruotolo*, 52 N.J. 508, 247 A.2d 1 (Sup. Ct. N.J. 1968). This neutrality and detachment qualifies the clerk of municipal court as a "magistrate" as required by the Fourth and Four-

teenth Amendments and this was the specific holding in *Ruotolo, supra*. *Ruotolo, supra*, is on point directly with this case, sub judice.

It is undisputed that the clerks of municipal court in the City of Tampa are not associated or connected in any way with the police department or any other law enforcement or prosecutive authority, but are directly responsible to the judicial branch of the municipal court.

"Mr. Bee: . . . Our Municipal Clerks are not sworn police officers. They are officers of the Court." (A.-25).

This fact is further borne out by Section 160.1, Charter of the City of Tampa, (Laws of Fla. 1961, Ch. 61-2915, Section 1) which is one of the special laws now before this Court in consideration of its constitutionality (App. 2). That special law provides that the city clerk appoints the clerks of the municipal court selected from an approved classified list of the civil service. (App. 2). He is not appointed by the chief-of-police. He is not a sworn police officer, does not have powers of arrest, does not wear a badge or police uniform, does not carry a gun and obviously does not prosecute cases.

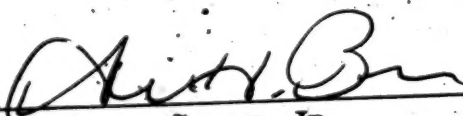
The clerks of municipal court of the City of Tampa meet the constitutional mandate requiring a neutral and detached magistrate be placed between law enforcement and the public.

CONCLUSION II.

The judgment of the Supreme Court of Florida (A. -41) should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of March, 1972, a copy of the foregoing Brief for Appellee was mailed, postage prepaid, to Malory B. Frier, Esquire, 1809 North Howard Avenue, Tampa, Florida 33607, Counsel for Appellant, and to Daniel A. Rezneck, Esquire, of Arnold & Porter, 1229 Nineteenth Street, N.W., Washington, D. C. 20036, of Counsel for Appellant. I further certify that all parties required to be served have been served.


WM. REECE SMITH, JR.
City Attorney
GERALD H. BEE, JR.
Assistant City Attorney
Counsel for Appellee

A P P E N D I X

**CONSTITUTIONAL PROVISIONS AND FLORIDA
STATUTES INVOLVED**

U. S. Constitution, Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

1. Florida Statute (1967) Section 168.04, F.S.A., which reads as follows:

**CLERK AND MARSHALL MAY TAKE
AFFIDAVITS AND ISSUE WARRANTS**

The clerk may administer an oath to and take affidavit of any person charging another with an offense by breach of an ordinance, and may issue a warrant to the marshal to have the accused person arrested and brought before the mayor for trial. The marshal may, in the absence of the mayor and clerk from the police station, administer oaths to affidavits of complaints and issue warrants for the arrest of persons complained against.

App. 2

2. Section 495 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 17, Chapter 5363, Laws of Florida, 1903, which reads as follows:

The Chief of Police, or any policeman of the City of Tampa may arrest, without warrant, any person violating any of the ordinances of said city, committed in the presence of such officer, and when knowledge of the violation of any ordinance of said city shall come to said chief of police or policeman, not committed in his presence, he shall at once make affidavit, before the judge or clerk of the municipal court, against the person charged with such violation, whereupon said judge or clerk shall issue a warrant for the arrest of such person.

3. Section 160.1 of the Charter of the City of Tampa enacted by the legislature of the State of Florida in Section 1, Chapter 61-2915, Laws of Florida, 1961, which reads as follows:

The city clerk of the City of Tampa, with the approval of the mayor, may appoint one or more deputies, such deputy or deputies to be selected from the approved classified list of the city civil service, and to have and exercise the same powers as the city clerk himself, including but not limited to the issuance of warrants. One or more of such deputies may be designated as clerks of the municipal court.